No. 3013

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LUMBERMEN'S TRUST COMPANY, trustee,

Appellant,

vs

TITLE INSURANCE & INVESTMENT COMPANY OF TACOMA (a corporation), COMMONWEALTH TITLE TRUST COMPANY (a corporation), HORACE FOGG, FRED S. FOGG, HERBERT GOVE and ALVA FOGG, administratrix of the estate of Franklin Fogg, deceased,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

CHARLES O. BATES,
CHARLES T. PETERSON,
EDWARD FOGG,
Solicitors for Appellees and Petitioners.

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the above named appellees, and respectfully petition this Honorable Court for a rehearing of this cause, for the following reasons:

FIRST.

At the outset, there are certain rules of law, which we presume may be regarded as settled.

I.

The provisions of the Constitution of the State of Washington, and the decisions of the Washington Supreme Court thereon, are the law of this case, and are binding on the federal courts.

Northern Pacific Ry. v. Meese, 239 U. S. 619;
C. M. & St. P. Ry. v. Minnesota, 134 U. S. 418;
Sioux City Co. v. Trust Co., 173 U. S. 107;
National Cotton Oil Co. v. Texas, 197 U. S. 130.

II.

The same is true of the decisions of the Supreme Court of Washington, as to questions of local law, and the public policy of the State of Washington.

City of Detroit v. Osborne, 135 U. S. 497;
Hartford Fire Ins. Co. v. C. M. & St. P. Ry., 175 U. S. 108.

III.

Even in cases involving questions of general law, as distinguished from questions of purely local law, or the public policy of the particular state, the federal courts, for the sake of harmony, and to avoid confusion, will lean towards an agreement of views with the state courts, if the question is balanced with doubt.

Sim v. Edenborn, 242 U. S. 135.

IV.

As to decisions of the trial court on questions of fact, we understand the rule of this court to be that the decision of the trial court as to the questions of

fact will not be disturbed by this court, unless this court finds them to be "contrary to the decided weight of the testimony".

Leggat v. McLure, 234 Fed. 621;
Tobey v. Kilbourne, 222 Fed. 763;
Thorndyke v. Alaska Perseverance Co., 164 Fed. 665;
Moore v. Moore, 121 Fed. 737;
Tate v. Holmes, 76 Fed. 667.

SECOND.

THE DECISION OF THIS COURT IS IN CONFLICT WITH ARTICLE XII, SECTION 22, OF THE CONSTITUTION OF THE STATE OF WASHINGTON, BEING THE PROVISION AGAINST MONOPOLIES, AND AGAINST AGREEMENTS AND COMBINATIONS FOR THE PURPOSE OF FIXING PRICES, AND IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE STATE OF WASHINGTON THEREUNDER.

I.

Article XII, Section 22, of the Washington Constitution, is as follows:

> "Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders, or with any copartnership or association or persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of

> this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise."

A further constitutional provision applicable here, showing that the above provision, in its prohibitive features, is self-executing, is Article I, Section 29, as follows:

> "The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise."

II.

The decisions of the Washington Supreme Court construing these provisions of the Constitution are:

Wood v. Seattle, 23 Wash. 21, in which the court says:

> "The prohibition is directed against combinations between corporations, companies, or individuals, made 'for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity', and it is combinations of this character and for these purposes that constitute the monopolies and trusts which the constitution interdicts."

And *Matson v. Hunt,* 82 Wash. 294, in which the court says:

> "The court instructed the jury that the contract was in violation of Article 12, Section 22 of the constitution. This provision of the constitution is as follows:
>
> 'Monopolies and Trusts.—Monopolies and trusts shall never be allowed in this state, and no incorporated company * * * in this state shall directly or indirectly combine or make any contract with any other incorporated company * * * for the purpose of fixing the price or limiting the

production or regulating the transportation of any product or commodity.'

It is argued by the appellant that the court erred in instructing the jury that this contract was in violation of this provision of the constitution. California Steam Nav. Co. v. Wright, 6 Cal. 258, is cited in support of the contention that this contract does not violate this provision of the constitution. The California cases cited were decided under the common law. It does not appear that California at that time had a constitution the same as ours. We are satisfied that our constitution in the section quoted prohibits contracts which provide for monopolies regulating the transportation of any product or commodity."

III.

In defining a monopoly under the laws of Washington, the Washington Supreme Court, in *Fisher Flouring Mills Co. v. Swanson,* 76 Wash. 657, lays down the rule as to what constitutes a monopoly, as follows:

"The public interest can only be secured by a prohibition of all contracts having a tendency to create or foster monopoly by a control of any given market. Noyes, Intercorporate Relations (2d Ed.), Sec. 357.

Since limitations of time and space do not serve as the test of the validity of contracts in restraint of competition, the test must be sought in the reason which underlies the rule of public policy. It must be found in the tendency of the given contract to control the given market. If the contract has that tendency, it is against public policy. If it does not have that tendency, it is not. In applying this test, the public interest is always the first and controlling consideration. A contract or combination creating a general, that is to say, complete restraint or restriction, however slight, within a given market, is essentially invalid because it must either result from, or tend to produce, a

monopoly. Its inevitable tendency is to destroy competition. Under an economic system founded upon competition, every general restriction, that is, every restriction covering all or a controlling fraction of a given commodity, is essentially unreasonable.

If considering all of the circumstances, including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of a given commodity within a given area by a single dealer or a few dealers, or by what amounts to a combination of all of the dealers, the contract is invalid. Substantial control of a market by one or a few is, of course, as injurious to the public as an absolute control."

THIRD.

THE COURT ERRED IN FINDING AND DECIDING THAT THE ABSTRACT BUSINESS IN PIERCE COUNTY COULD NOT BE MONOPOLIZED.

In view of the fact that this court fails to mention, or give any consideration to the fact agreed between the parties that prior to 1909 the three abstract companies were doing all of the abstract business in Pierce County, and fails to mention, or give any effect to the testimony of O. M. Smith, one of the plaintiffs, and the uncontradicted testimony of all the witnesses for the defendants, including four County Auditors, to the effect that it was impossible for the County Auditor to make an abstract of title, because he had no tract index, and in view of the fact that this court assumes and states as the basis of its opinion that there could not be a monopoly in the abstract business, because it

says anyone could make abstracts from the public records, it is apparent that this court entirely misunderstood the nature of the abstract business in Pierce County.

This court may have been misled by the fact that in some of the Pacific Coast States, particularly in Oregon, the public records are so kept that a private individual, without any abstract plant, can make abstracts, and that in Oregon, particularly in Portland, there are a considerable number of what may be called "curbstone" abstractors, in addition to the regular abstract companies.

This court also lost sight of the fact that all parties to this action stipulated that the abstract business in Pierce County was transacted exclusively by abstract companies.

See Stipulated Fact No. 2 (Record, p. 76), as follows:

> "Prior to December 7th, 1909, the aforesaid companies had carried on business in active and actual competition with each other, *and for many years prior to said date said companies owned and controlled the only abstract plants in said county, and transacted all of the abstract business therein.*"

And that O. M. Smith, one of the plaintiffs, and numerous witnesses for the defendants, including four County Auditors, all testified that it was necessary to have a tract index to do an abstract business, or to make an abstract, and that the County Auditor had no such tract indexes. Not only is this the case, but

County Auditors are prohibited by law in the State of Washington from making or keeping such tract indexes.

Dirks v. Collins, 37 Wash. 621, where the court said:

> "This action was brought by a taxpayer to enjoin the respondents, as county officers of Spokane County, from keeping in the auditor's office, at public expense, a set of books known as "tract indices", upon the ground that such books were not authorized by law. Upon the trial of the case the court below found that the county auditor kept and maintained such a set of books at public expense, but also found that such books were a public utility, and that this abolishment would make more expense to the county than the maintenance of the books. The court therefore concluded that the maintenance of the tract indices is not an injury to the appellant, and dismissed the action. The appeal is from this order.
>
> In the case of Smith v. Lamping, 27 Wash. 624, 68 Pac. 195, where a contract (for $22,500) had been entered into by the board of county commissioners of Pierce County for the preparation of tract indices such as the ones kept by Spokane County, now in question, we held that the county board had no authority to enter into such a contract, because the Legislature had provided for the kind of indices to be kept by the county auditor in his office, and there was no authority for a different method to be prepared or kept at public expense. In the course of that opinion, speaking to this point, we said at page 635 of 27 Wash., page 199 of 68 Pac.:
>
> 'It is not reasonable to suppose that when the Legislature so carefully described the system that should be followed by county auditors, and which should be uniform throughout the state, it at the same time intended to authorize county commissioners to expend large sums to maintain other and different systems. The fact that a certain mode or method has been expressly designated by

the Legislature, we think, excludes the idea that a different mode or method may be pursued. The Legislature has not only prescribed the method, but has expressly made it the duty of the county auditor to follow it; and this, we think, negatives the idea that another method may be pursued at public expense by authority of the county commissioners. The new method may be more convenient and more in accordance with the enlightenment and enterprise of the times, but, until the Legislature has authorized its adoption, and conferred upon county commissioners the power to expend public money for that purpose, we think it must be held that it is beyond their power to so expend the county's funds.'

We think that case is conclusive of the question presented on this appeal.

"Counsel for respondents contend, however, that under the provisions of sections 417, 418, 1 Ballinger's Ann. Codes & St., (being Section 8792 of R. & B. Code, cited on page 21 of appellant's brief), which are as follows: (Quoting the statute).

"We think the sections above quoted were not intended to make the county auditors public abstracters, to the extent of requiring them to make a complete list of all liens and all transfers affecting particular pieces of land upon demand therefor, but, rather, were intended to require the auditor to search for certain instruments to which his attention is specifically directed by the applicant, and, if such instruments are recorded or filed in his office, to certify as provided in section 417."

This testimony, and this decision of the State Supreme Court demonstrates that this court was in error in assuming that the abstract business in Pierce County could not be monopolized, for the alleged reason that anyone could make abstracts, simply because the public records are open to the inspection of all.

FOURTH.

IT IS APPARENT FROM THE OPINION OF THIS COURT THAT IT OVERLOOKED AND FAILED TO CONSIDER CERTAIN MATERIAL EVIDENCE, THE CONSIDERATION OF WHICH IN CONNECTION WITH THE OTHER FACTS OF THE CASE WILL RESULT IN AN AFFIRMANCE OF THE JUDGMENT OF THE TRIAL COURT.

I.

Aside from the court's apparent misunderstanding of the nature of the abstract business in Pierce County, there is little difference between the findings of the trial court, and the findings of this court, as to many of the facts of the case, but in certain controlling particulars this court has overlooked and failed to give effect to certain evidence appearing in the record.

In order that the court may have the facts in mind, we request the court to again read the agreed statement of facts found on pages 75 to 83 of the Transcript, and the testimony of O. M. Smith, on page 116, the testimony of Horace Fogg, on pages 119, 120 and 123, the testimony of Fred S. Fogg, on pages 129, 131, 133 and 134, the testimony of Franklin Fogg on page 137, and the testimony of the four County Auditors of Pierce County, Washington, on pages 138 to 140 of the Transcript.

In its statement of the case, this court wholly failed to mention, or to give effect to the last sentence in Agreed Fact No. 2 (Trans. p. 76), to the effect that prior to December 7th, 1909, the three abstract companies "owned and controlled the only abstract plants

in said county, *and transacted all of the abstract business therein.*"

The court further failed to mention or give effect to the testimony of plaintiff's witness Smith, as follows:

> "The first thing that a company has to do in order to render that service in the conduct of its business, is to have a tract index showing all of the instruments affecting any particular piece of property in a county. Second: To have a name index. It should show everything that may in any way, affect real property that does not contain a description of land, such as judgments, personal judgment, attachments, etc. Everything you would want to complete a chain of title",

and to the uncontradicted testimony of the Foggs, and of the four County Auditors, found on the pages above referred to, that on account of the nature of the abstract business in Pierce County, and on account of the way the auditor's records are kept in Pierce County, the Auditor did not make abstracts, and that it was absolutely impossible for anyone to make abstracts, without an abstract plant, and that it is a physical impossibility for the County Auditor in Pierce County to make a reliable abstract, and that unless an abstract of property in Pierce County was made by one of the abstract companies equipped for the purpose of making abstracts, it would not be accepted in the ordinary course of business, and the testimony of Horace Fogg, that in the fifteen years he had been in the abstract business he had never heard of an abstract being made by the Auditor.

The court further failed to give effect to the fact that the Commonwealth Company had absolutely noth-

ing whatever to do with any of the transactions prior to the execution of its written guaranty in December, 1911, and had nothing whatever to do with the transactions of 1909.

The court failed to mention, or give effect to the uncontradicted testimony, as shown on pages 129, 130, 131, 133, 134 and 137, of the Transcript, to the effect that the only consideration flowing to the Commonwealth Company for the execution of the guaranty agreement, was the shipment of the plant of the Tacoma Company to Portland, thus getting it out of the way, and avoiding the possibility of that plant falling into hostile hands through a foreclosure of the 1909 mortgage, and the agreement on the part of Smith and Willoughby to stay out of the abstract business in Pierce County for a period of thirty-six years.

This court failed to consider the fact that the agreements of 1911, including the guaranty of the Commonwealth Company, resulting in the shipment of the Tacoma plant to Portland to be kept in a vault for thirty-six years, and thus eliminating it from competition, and the agreement on the part of Smith and Willoughby to keep out of the abstract business in Pierce County, were not connected with any sale.

This court further failed to mention, or give effect to the uncontradicted testimony of all of the Foggs that the actual purpose of all of the transactions of 1909 and 1911, was to form and maintain a monopoly of the abstract business and to do away with the price-cutting of abstracts in Pierce County, and that the lease of the Wilson plant, and the sale of the Wil-

loughby plant to a specially organized five thousand dollar corporation, where there was no further liability of any nature on the part of its stockholders, were simply a means to an end intended to be accomplished.

This court in its opinion failed to mention, and apparently failed to give consideration, to the avowed purpose of the parties in making the agreements involved here, as expressed in the letters passing between Fogg and Willoughby during the negotiations leading up to the making of the agreements involved in this action, wherein Fogg, on July 22nd, 1911, wrote Willoughby as follows:

> "The abstract business is now so poor that some new plan must be made, as there is not enough business to even pay the running expenses of the two plants, and in addition to that, the new man is coming into active competition and must be headed off before he has a chance to build up a good plant. If you will give me your share of help, we will still try to pull the thing out O. K., as almost any revenue derived will be more than could be had by fighting him and each other too. After considering a good many plans, this one seems to be the best.
>
> That is, increase the capital stock of our company to four hundred thousand dollars, give you $80,000, and Wilson $38,000 preferred stock at 5 per cent, in exchange for your plants, then operate only our plant and as soon as the amount of work increases any, to cut the rate to seventy-five cents and later to fifty cents, if necessary to keep a clear field. This plant could easily do several times the total abstract business to be done and we could make more money for us all by operating one plant at reduced rates than to keep the rates up and let the new man build up a plant out of his profits, and I am sure that low

abstract rates will keep out competition better than several companies at higher rates would do. At a dollar, the new man would make a little profit on each order, and no one outside of ourselves can make abstracts at less than a dollar and make a cent of profit. We could do it because our plant is so complete and we have such large amount of stock on hand.

By making your stock preferred, you will get your dividends before we get anything at all and will relieve you from all worry or danger of having your plant back on your hands. You would also be able to sell this stock or use it as security much better than you can your present mortgage. We would want to put in some clause giving the company the right to retire preferred stock at certain times and in certain amounts. Kindly take up this plan with Mr. Smith and drop me a line as to what you think of it and also send any suggestions you may think of as to any better way. Our interests here are mutual and must be worked out together or both plants would be operated at a loss, for the benefit of the public.

Our idea would be to work into title certificates as fast as possible and use every effort to put new additions under the certificate system, and once under a certificate, that addition would be out of reach of any other company. By working for the first few years to keep the field clear rather than to make anything more than interest on the investment, we would have in the course of five or ten years, a business that would be almost out of the line of competition, both on account of the cost of another plant and by that time, we would have a large part of the titles under a certificate system."

(Record, p. 79.)

And again on August 3rd, 1911, Fogg wrote Willoughby, as follows:

"I am afraid our ideas are too far apart to do us any good. The situation here is so bad that

we must have some relief or drop out of our present deals. The plan you suggested would not relieve us any, but would in fact make it far more binding on us, and if we are not able to make enough money to pay the amounts due under the present plan, we would not be able to do so under your plan.

I tried to figure out some plan that would ease us up and at the same time place you in a better and more secure position, and I think the plan suggested by me would do that. You cannot expect to be paid anything when both plants are not making anything, but under my scheme, you would get your five per cent interest from the combined earnings before we would get a cent for ourselves, and your principal would be absolutely secure, which to my mind would be a much better situation for you than the present one, although your rate of interest would be a little less than the present speculative one.

Whether or not any deal is made with you or Wilson, the rate will have to be cut to seventy-five cents and we expect to do that at once and with the intention of making it a permanent rate. We can pay expenses at fifty cents if we get most of the business, and both Frank and Mr. Gove thought it the best plan to come back to our own company and make a permanent rate of fifty cents and not try to buy the other plants as long as there was a fourth man in the field whom we had to fight anyway, but I thought I would take it up with you first and get your ideas on the matter before we did anything. It may be that as you are now footloose, you will want to come back here and enter the abstract field again, but with so little work to be done, we could each leave one stenographer in the office to do the work and the rest of the force go out after the four or five orders a day that could be dug up.

If you come up this way, you might drop in and we could talk over the situation anyway."

(Record, p. 81.)

And on August 7th, 1911, Willoughby replied to Fogg, as follows:

> "Your letter of August third relative to the abstract situation at Tacoma has been received.
>
> We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. Would rather take the plant back and operate it than to go into a proposition whereby we would be a minority stockholder and therefore have nothing to say in the management of the company.
>
> I expect to be in Tacoma within the next two weeks and will then talk over with you any scheme you may have that will be of mutual benefit to us all. You might bear in mind this fact and that is if we merge the plants as suggested in your letter, our interests must be protected by a guarantee of some kind."
>
> (Record, p. 83.)

This court left out of consideration in determining the motives of the parties in the transaction of 1909, the fact that the plant of the Commonwealth Company alone, or the plant of Smith & Willoughby alone, were each capable of doing all of the abstract business in Pierce County, Washington, and that in so far as the production of abstracts was concerned there was nothing to be accomplished by Willoughby, in behalf of the Smith & Willoughby plant, or Franklin Fogg, in behalf of the Commonwealth plant in taking the lease of the Wilson plant, except to eliminate it from competition, and there was nothing to be gained in the making of the arrangment regarding the Smith & Willoughby plant, and the assignment of his interest

in the lease of the Wilson plant by Willoughby to Franklin Fogg, except to get the entire abstract business in Pierce County under one control with absolute power to fix prices.

These facts, thus omitted by this court, are among the essential and controlling facts which led to the difference between the conclusions of the trial court, and the conclusions of this court.

II.

Bearing in mind these essential facts, which were considered of primary importance by the trial court, but which apparently were not considered by this court, the facts of this case, as shown by the record, are as follows:

On and prior to December, 1909, the Willoughby, or Washington Company, and the Commonwealth, or Fogg & Gove Company, and the Wilson Company were in active and actual competition in the abstract business in Pierce County, and for many years prior to said date said three companies owned and controlled the only abstract plants in Pierce County, and transacted all of the abstract business therein. That the competition between said companies was very keen, and they were cutting prices.

That for some days prior to December 6th, 1909, the Foggs, Gove and Willoughby & Smith had been negotiating the sale of the abstract plant of the Washington Company to a corporation to be formed for that particular purpose.

That during said negotiations, and on December 6th, 1909, Willoughby and Franklin Fogg leased the Wilson plant, for a period of five years, at a monthly rental of $316.00, plus the actual expense of keeping the plant current, which lease provided that the Wilson plant should remain in the exclusive possession of the Wilson Company, but should not be operated, and further provided that the officers of the Wilson Company should not start or be interested in any other abstract plant in Pierce County during the life of the lease.

That on December 7th, 1909, the Tacoma Company was organized by A. D. Willoughby, and one A. F. Albertson and F. A. Rice, with a capital stock of five thousand dollars, of which Willoughby subscribed for 48 shares and Albertson and Rice the remaining two shares. That thereupon the Washington Company transferred its abstract plant and business to said Tacoma Company for the agreed price of one hundred thousand dollars, payable ten thousand dollars in cash and the balance of ninety thousand dollars to be paid over a series of years, and secured by a mortgage on the plant so conveyed, plus some additional files transferred to the Tacoma Company by the Commonwealth Company by its bill of sale, of said date, in consideration of the sum of one dollar and other good and valuable considerations.

(Record, p. 110.)

On the same day said new Tacoma Company, as the owner of the former Willoughby plant, and the Washington Company, as the holder of the mortgage on the Tacoma plant, entered into an agreement with the

Commonwealth Company to the effect that "whereas the abstract plants of the respective companies might become lost, damaged or destroyed by fire, theft, etc.", therefore, for the mutual protection of said plants, it was agreed that in case of the damage or destruction of the plant of either company, such company should have the right to use the plant of the other, without expense, for the purpose of restoring its records so destroyed.

(Record, p. 111.)

On the same day Willoughby, as President of the Tacoma Company, executed and delivered the notes of that company for the ninety thousand dollar balance of the purchase price, and the mortgage of the Tacoma Company securing the same. By the terms of the mortgage part control of the plant of the Tacoma Company was preserved in Smith and Willoughby's Washington Company.

On the same day Willoughby assigned his interest in the Wilson lease to Franklin Fogg, who held the same until its expiration, and never assigned it to any company. Willoughby also on the same day assigned his stock in the Tacoma Company to the Foggs and Gove, who continued to hold the same at the commencement of this action.

Sometime prior to the making of this deal of 1909 the price of abstracts of title in Pierce County was one dollar per instrument, but as a result of competition between the three companies, the price had been cut from twenty-five to fifty per cent. That after the

completion of this deal prices were again raised to one dollar per instrument.

In 1910 the Tacoma Title Company, a new abstract concern entered the field in Pierce County, and in December, 1911, was doing about ten per cent of the total abstract business of the county, while the Commonwealth Company and the Tacoma Company did the other ninety per cent.

In the summer of 1911, the abstract business had fallen off so that it had become burdensome for defendants Fogg and Gove to operate the two separate plants and to pay the interest and make payments on the ninety thousand dollar mortgage made by the Tacoma Company, and to pay the extra expense of the part control of the Tacoma Company preserved by Smith and Willoughby under the mortgage.

Negotiations were had between Smith and Willoughby, and the Foggs and Gove, of which the letters above quoted are a part, resulting in the agreements involved in this action, the effect of which relieved the Foggs and Gove of this unnecessary burden of operating the Tacoma plant, with the incidental extra expense of paying the extra cost of Smith & Willoughby's part control thereof under the mortgage, by the Tacoma Company discontinuing business, and the existing indebtedness of the Tacoma Company rearranged with it on more favorable terms. In consideration of the shipping of the Tacoma Company's plant to Portland, to there remain locked up in a vault, thus removing it absolutely from competition with the Commonwealth Company, and the further agreement on the part of

Smith and Willoughby not to engage in the abstract business in Pierce County, Washington, for a period of thirty-six years, the Commonwealth Company, which up until this time had had nothing to do with any of the transactions and was not liable either directly or indirectly for any of the indebtedness of the Tacoma Company, executed its agreement of guaranty, by which it guaranteed the payment of a portion of the existing indebtedness of that company.

In consideration of all of these facts the trial court, with the witnesses before it, with a chance to observe their conduct and demeanor, found that the dominant purpose of Willoughby, Smith, the Foggs and Gove, and of all of the parties interested in all of the transactions of 1909 and 1911, was to form and maintain a monopoly of the abstract business in Pierce County, for the purpose of enabling them to fix and control the prices of abstracts, and to stifle all competition in the abstract business, and that the lease and sale of the Wilson and Willoughby plants, and the transactions of 1911, were merely a means or device adopted for the accomplishment of that purpose, and that, for this reason, the arrangements were in violation of the Constitution of Washington, and of the decisions of the Supreme Court of Washington, and were illegal and void.

We most earnestly insist that on the record and undisputed facts in this case this court in finding the facts as it did, contrary to the facts as found by the trial court, to the effect that the dominant purpose and controlling motive and intent of the parties was

to effect a monopoly, stifle competition and thereby fix and control prices in the abstract business in Pierce County, did violence to the well established rule that in this court the decisions of questions of fact of the trial court will not be disturbed, unless this court finds them to be contrary to the decided weight of the evidence.

We further insist that the decision of the trial court is not only not "contrary to the decided weight of the testimony", but is supported by the uncontradicted testimony in the case, and that this court will, upon a re-examination of the record in the light of the facts to which we have called attention, and which apparently were not fully considered by the court in the decision already rendered, agree with the decision of the trial court on this branch of the case.

In its opinion this court stated the rule of law relative to monopolies to be as set out in its quotation from *Cooke on Combinations,* 2d ed., Section 116, as follows:

> "A monopoly exists where all, or so nearly all of an article of trade or commerce within a community or district, is brought within the hands of one man or set of men, so as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic."

And also in the court's own restatement of the rule, as follows:

> "We find no principle of public policy or provision of the Washington law that requires that two or more persons or corporations engaged in

> the same business, whose competition threatens ruin to all, shall continue in that competition until one or more is forced out of business, or that prohibits the ending of the destructive competition by the voluntary act of the competing parties, by one purchasing and the others selling competing plants, thus securing economy of administration, *so long as the transactions are unaccompanied by circumstances to indicate that the contracts were entered into only as a device to enhance prices or to secure control of the market.*"

Giving full weight to every part of the above quotations they are not in conflict with the decision of the Supreme Court of the State of Washington in the *Fisher Flouring Mill case*, supra.

The complaint we make is not as to the rule of law laid down by this court in this connection, but rather that the court failed to apply that rule of law to the undisputed evidence.

It is undisputed that competition between the three companies prior to 1909 was keen, and that prices were being cut from twenty-five to fifty per cent, and we maintain that the evidence conclusively shows that the moving cause of the transactions in question was to enhance prices and control the market. The Commonwealth Company, of which the Foggs and Gove were the sole stockholders, possessed an abstract plant capable of doing all of the abstract business in Pierce County, and in fact that plant had done all this business before the field was invaded by Willoughby and Wilson. In taking the lease of the Wilson plant it was provided that the plant should remain in the exclusive possession of the Wilson Company, but should not be

operated. What use had the lessees for this lease, for which it was agreed a rental of $316.00 a month should be paid? The transaction is its own answer. It was for the purpose of suppressing the competition of the Wilson plant. Willoughby aided and assisted, and was one of the prime movers in obtaining this lease, and it was taken in the name of Willoughby and Franklin Fogg.

The next day the Willoughby plant was conveyed to a small dummy corporation organized by Willoughby for that purpose, whose capital stock of five thousand dollars was immediately paid up in full, so that there remained no further liability on its stockholders in connection with the Willoughby deal, and the mortgage given to secure the ninety thousand dollars of the purchase price provided that the plant should be under the joint control of both parties.

Measuring the conduct of Smith and Willoughby in this transaction by the normal conduct of one whose only concern is to effect a legitimate sale of his property, can it be said that they did not participate in and become actors in the purposes and designs of the Foggs and Gove? They themselves had an abstract plant of sufficient capacity to do the entire abstract business of Pierce County; notwithstanding this fact Willoughby becomes a party with Franklin Fogg to the lease of the Wilson plant for which his company likewise had no use, and could make no use under the terms of the lease. Was this the reasonable and normal method of a seller whose only concern is to make a sale of his own property? Was his participation

in the organization of this five thousand dollar corporation to take title to the one hundred thousand dollar property, which he was selling, the usual ordinary method employed by one who has no concern, but to make a legitimate sale? If a man's motives are to be judged by the methods which he employs it seems to inevitably follow that the conclusion of the trial court that Smith and Willoughby, and the Foggs and Gove were all knowingly working to a common end—the monopolizing of the abstract business in Pierce County, with the power to fix and enhance prices, and to secure the control of the market, is the correct one, and it must be just as apparent that these transactions, to use the language of this court,

> "were accompanied by circumstances indicating that the contracts were entered into only as a device to enhance prices, and to secure the control of the market".

FIFTH.

THIS COURT ERRED ALSO IN ITS CONCLUSION OF LAW, THAT BECAUSE IN THE TRANSACTIONS OF 1909 AND 1911, THE PARTIES WERE ONLY ENDEAVORING TO ESCAPE THE RESULTS OF THEIR RUINOUS COMPETITION, AND HAD NO INTENTION TO WRONG THE GENERAL PUBLIC, AND THAT BECAUSE THE DEFENDANTS DID NOT ABUSE THE ABSOLUTE CONTROL OF THE ABSTRACT BUSINESS WHICH THEY THUS ACQUIRED, THE TRANSACTIONS ARE NOT WITHIN THE PROHIBITION OF THE CONSTITUTION, AND ARE FREE FROM ILLEGALITY.

This conclusion overlooks the fact that, regardless of the decisions elsewhere, under the Constitution of

the State of Washington, this particular remedy for their troubles was forbidden to the parties by the express mandatory provisions of the Constitution, and the decision of the Supreme Court of Washington.

These mandatory prohibitions are that the parties cannot get relief by forming a monopoly, or by entering into a contract or combination, directly or through stockholders or otherwise, for the purpose of fixing prices. The necessities of the parties cannot override these prohibitions of the Constitution.

The fact that the contract is one to raise or control prices which are ruinous offers no excuse, as the constitutional provisions prohibit all price fixing contracts, or combinations, and contain no exceptions.

In *Standard Sanitary Manufacturing Company v. U. S.*, 226 U. S. 49, the Supreme Court stated the rule to be as follows:

> "The Sherman law is a limitation of rights,—rights which may be pushed to evil consequences, and therefore restrained."
>
> "This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that, in the very latest of them, the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy 'by resort to any disguise or subterfuge of form', or the escape of its prohibitions 'by any indirection'. United States v. American Tobacco Co., 221 U. S. 106, 181; 55 L. ed. 663, 694; 31 Sup. Ct. Rep. 632. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a sup-

posed accommodation of its policy with the good intention of parties, and, it may be, of some good results."

And in *International Harvester v. Missouri,* 234 U. S. 209, the Supreme Court said:

> "The specification under this head is that the supreme court found, it is contended, benefit—not injury—to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion, the answer is immediate. It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. Armour Packing Co. v. United States, 209 U. S. 56, 62; 52 L. ed. 681, 684; 28 Sup. Ct. Rep. 428; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49; 57 L. ed. 107, 117; 33 Sup. Ct. Rep. 9. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

And in *U. S. v. Union Pacific Ry.,* 226 U. S. 88, the Supreme Court says:

> "Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopolies which determines the applicability of the act."

SIXTH.

THE GUARANTY OF THE COMMONWEALTH COMPANY WAS NOT GIVEN IN CONNECTION WITH ANY SALE, THE ONLY SALE MADE HAVING BEEN MADE IN 1909, TWO YEARS BEFORE.

In regard to the liability of the Commonwealth Company, this court in the course of its decision cites and

quotes from the case of *U. S. v. Great Lakes Towing Company,* 208 Fed. 733 (Op. 11), and cites and quotes from the case of *Camors McConnell v. McConnell,* 140 Fed. 412 (Op. 13) (which decision was, however, reversed by C. C. A., in 152 Fed. 321), to the effect that when a seller in connection with a sale of his property, with the good will, to another, as ancillary and incident thereto enters into a covenant with the buyer not to compete with the buyer in any way, so as to diminish the value of the property or business sold, within reasonable limitations as to time and territory, that such agreements will be enforced and upheld. Whether this be good law or not, it has no application to the facts of this case, because here there was no sale, and the agreements of 1911, upon which this action is based, were in no wise connected with the sale of any property or business to anybody. This court lost sight of the fact that the only sale of a plant, or business, was that made in 1909, and that the guaranty of the Commonwealth Company, made in December, 1911, was made solely in consideration of the agreement of Smith and Willoughby not to engage in the abstract business in Pierce County, Washington, for a period of thirty-six years, and to prevent the abstract plant of the Tacoma Company falling into hostile hands through the foreclosure of the first mortgage, and insuring its being removed from the field of competition by being boxed up and sent to Portland, and the good will attached to its business was not secured to anybody—it was simply cast adrift.

SEVENTH.

THIS COURT'S DECISION IS IN DIRECT CONFLICT WITH ARTICLE XII, SECTION 6, OF THE CONSTITUTION OF THE STATE OF WASHINGTON, AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE STATE OF WASHINGTON CONSTRUING THIS PROVISION, AND PARTICULARLY THE DECISIONS OF THE SUPREME COURT OF THE STATE OF WASHINGTON, HOLDING THAT THE PROVISIONS OF SAID SECTION CANNOT BE WAIVED.

I.

Article XII, Section 6, of the Constitution, provides:

> "Corporations shall not issue stock, except to bona fide subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void."

While this court does not expressly so hold, it intimates that the undertaking of the Commonwealth Company, and the mortgage given to secure the same do not come within the terms of this section. The court's language indicates that it was influenced to this conclusion by the language of the caption of this section wherein the court said:

> "The caption of the section, 'Limitations upon issuance of stock', and the language of the section lead to the conclusion that the phrase 'other obliga-

> tion for the payment of money', therein prohibited, was intended to be of the same nature as 'bonds'."

This caption is merely a caption supplied by the annotater, and is no part of the section, and is not contained in the original draft of the Constitution as adopted by the people of the State of Washington.

See

Stimson's American Constitutions, Ed. of 1894.

See first publication of Washington Constitution, 2 Hill's Statutes & Code of Washington, page 842 (1891).

The words, "or other obligation for the payment of money", were peculiar to the Constitution of the State of Washington at the time of its adoption. While we find that the Constitutions of Alabama, Arkansas, California, Colorado, Idaho, Montana, Nebraska, Illinois, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, South Dakota, Pennsylvania and Texas, which were adopted at or prior to the time of the adoption of the Washington Constitution, contained language substantially identical with the other portion of this section of the Washington Constitution, in the other particulars specified in Section 6, none of those constitutions contained the words, "or other obligation for the payment of money", but simply confined their prohibitions to the issuance of stock or bonds. The injection of these words into the Constitution of the State of Washington must have been intended to broaden the provision as adopted in other states, otherwise they could serve no purpose.

The Supreme Court of the State of Washington in *Bronson v. Syverson,* 88 Wash. 275 and 279, laid down the following rules for the construction of the Constitution of Washington:

> "As we said on another occasion, it is a cardinal rule of construction that the language of a state constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and words employed therein have meaning as the generality of the people understand them. When, therefore, words are used in a constitution which have both a restricted and general meaning, the general must prevail over the restricted, unless the nature of the subject-matter or the context indicates that the limited sense was intended.
>
> Another reason which leads us to the conclusion that judgments in actions for torts are debts within the meaning of the constitution is found in the fact that the prohibition with respect to imprisonment for debt therein is broader and more sweeping in its terms than are the constitutions of the states whose courts maintain a contrary doctrine. In so far as our researches have gone, the constitutions of such states contain exceptions to the general declaration which materially narrow its scope and effect. Ours, it will be observed, is without limitation as to the character of the debt, the only exception being cases of absconding debtors, which is as applicable to debts evidenced by judgments founded on contract as it is to judgments founded on tort. This distinction we cannot think to be without meaning. It would seem that, had the makers of the constitution intended that there should be limitations to the broad expression used, they would have so stated in express terms, or at least in the terms of the existing constitutions under which the limitations had been declared."

In view of the further provision of the Constitution that all fictitious increase of indebtedness shall be void, the words, "or other obligation for the payment of money", cannot be limited to bond-like obligations, because to so limit the meaning of those words would leave it open to the corporation to create any amount of fictitious indebtedness, so long as it avoided creating that indebtedness in the form of bonds, or bond-like obligations. Again, if it was intended that the words used should cover only bonds, and bond-like obligations, there was no necessity for using the words, "for the payment of money", because there are no bonds, or bond-like obligations, except "for the payment of money".

Applying the rule of construction laid down by the Washington Supreme Court in the case above cited, it is plain that this provision of the Constitution was intended to apply to all obligations for the payment of money, whether in the form of bonds, or other instruments issued by the corporation, which might create an indebtedness against the corporation. Only by this construction can all of the words of the section be given effect.

Thus construed the guaranty of the Commonwealth Company in the case at bar was in violation of this provision since it was a contract for the payment of money, and thus created an indebtedness.

This construction is in accordance with the actual decision of the Supreme Court of Washington, in *Jorguson v. Apex Gold Mining Co.*, 74 Wash. 243, which was an action on a contract on which the Apex Gold

Mining Company agreed with Jorguson that if he would purchase certain stock of the corporation, the corporation would pay to him one thousand dollars in dividends within eighteen months, or if such amount was not paid as dividends that the same should be paid in any event. No dividends having been earned or paid, and the thousand dollars not having been paid, Jorguson brought suit on his contract to enforce payment. The Supreme Court sustained the decision of the trial court that Jorguson was not entitled to a judgment, either for dividends or for the thousand dollars, because the contract violated the above section of the Constitution.

The case of *Memphis etc. Ry. Co. v. Dow*, 120 U. S. 287, cited by the court in this connection, cannot be considered as an authority on the construction of this section, as the Arkansas Constitution under consideration there did not contain the provision, "or other obligation for the payment of money", peculiar to the Washington Constitution.

II.

Under the decisions of the Supreme Court of the State of Washington the provisions of Article XII, Section 6, of the Constitution cannot be waived.. Neither can any act done in violation of it be ratified.

In the course of its opinion (Op. 16), this court says:

> "But if the constitutional prohibition of Washington was not intended for the purpose indicated in Memphis &c Ry. v. Dow, it could only have been intended for the protection of stockholders and creditors of corporations. There is no question here of the right of creditors. So far as it appears,

> the plaintiff is the only creditor. There can be no doubt that the stockholders could waive their right to the constitutional protection, there being involved no question of detriment to the community, and this they did by ratifying the undertaking of the corporation and giving their individual guaranties."

This is in direct conflict with the decisions of the Supreme Court of the State of Washington declaring the public policy of the state with respect to the right of the corporation, or of stockholders, to waive the provisions of this section.

In *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, where a corporation guaranteed dividends in a sum equal to the amount paid for the stock, and notwithstanding the court found that the corporation authorized the agreement under a *resolution unanimously adopted by all of its stockholders*, it denied recovery under the agreement.

In the case of *Kom v. Cody Detective Agency*, 76 Wash. 540, the Supreme Court of the State of Washington having under consideration a similar question found it necessary to discuss the *Jorguson* case.

In the course of its opinion the court said:

> "In the Jorguson case, the rights of creditors were not involved. The court held in strict line with the statute that a corporation could not impair its capital stock by the payment of dividends. While it does not appear in the reported decision, we deem it not out of place to say that a very able petition for rehearing was filed in that case urging that, inasmuch as the rights of creditors were not involved, and the controversy being between the individual and the corporation, we should recede from our holding and allow a recovery. We

denied the petition for rehearing; so that, when the subsequent history of the Jorguson case is understood, it seems to the writer that it is directly in point."

Quoting from *Hamor v. Taylor-Rice Co.* 84 Fed. 397, the court said:

> "But whether a corporation be solvent or insolvent, the fund represented by its capital stock must remain inviolate for the protection of its creditors. In the absence of statutory authority in that behalf, a corporation has no legal power to reduce this fund by any formal or voluntary act or contract on its part, to the prejudice of its creditors, either then or thereafter existing, whether by distributing any part of it among the stockholders by way of dividend, or by giving any part of it to one or more stockholders, or by disposing of any part of it in any manner, except by way of changing its form to meet the exigencies of the corporate business.
>
> The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

And again at page 547, the court said:

> "The logic of our own cases leads us to the imperative conclusion that the absence of present creditors will not vitalize the contract sued on. This court is still committed to the trust fund doctrine as applied to corporations.
>
> * * * We have discussed this case upon general lines, not because we have doubted the application of the statute, but because of the fact that many of the American courts have been disposed to write an exception into the statute in favor of contracting parties where the rights of present creditors are not involved."

That the undertaking of the Commonwealth Company involved here, and the mortgage given to secure the same are embraced within the constitutional provision above quoted is demonstrated beyond question by the decisions of the Supreme Court of the State of Washington, to the effect that the assets of a corporation are a trust fund in the hands of its officers as trustees, it being the settled policy of the Washington court that the whole purpose of the law, both constitutional and statutory, that the creation of corporate securities or liabilities not representing actual value, and which may impair the assets of a corporation, are inherently illegal.

In this connection that court in *Lantz v. Moeller,* 76 Wash. 435, quoting from one of its early decisions, said:

> "The corporation must be in the actual condition which it represents itself to be in financially. If it were allowed to hold itself out as having a capital stock of $100,000 when in reality the capital stock, which is and must be, under the theory of the law, assets in the hands of the corporation, is worth only one-half the amount, the corporation is to that extent doing business under false colors, and is obtaining credit upon the faith of an asserted estate which is purely fictitious."

We submit that these decisions clearly demonstrate in no unmistakable way that the conclusion of this court in the case at bar that the stockholders of the Commonwealth Company could waive a violation of the above Section of the Constitution, and the further holding that the case at bar is taken out of the purview of the constitutional provision, because there were no present creditors of the Commonwealth Company, is directly

opposed to the decisions of the Supreme Court of Washington.

The undertaking of the Commonwealth Company, and the mortgage given by it to secure the same, were clearly fictitious within the definition of that term laid down by the Circuit Court of Appeals in *Kemmerer v. St. Louis Blast Furnace Co.,* 212 Fed. 63, where the court said:

> "No consideration, whatever, passed from Whitney-Kemmerer Company to the Furnace Company at the time the bonds were issued and pledged, and none ever has passed on account of the bond issue; still an indebtedness of $4480 is sought to be proved against the Furnace Company. If this does not make the amount of the claim fictitious within the meaning of the law, then we are unable to comprehend the meaning of the word. Fictitious—not true or real. Cent. Dict."

In this connection we respectfully refer this court to the cases cited in our brief on appeal at pages 93 and 94.

The cases cited by this court in its opinion are instances of a waiver of affirmative rights granted to the citizen, the waiver of which does not contravene any principle of public policy, and are not instances of a waiver of mandatory prohibitions.

EIGHTH.

THIS COURT WAS IN ERROR IN HOLDING THAT THE COMMONWEALTH COMPANY WAS IN FACT THE PURCHASER OF PLAINTIFF'S PLANT, AND THAT IT ORGANIZED THE FIVE THOUSAND DOLLAR CORPORATION FOR THE PURPOSE OF RECEIVING TITLE TO THE PURCHASED PROPERTY.

The stipulated facts are (Record, p. 77), that Willoughby, and one A. F. Albertson and one F. A. Rice, incorporated the five thousand dollar purchasing company, for the purpose of receiving title to the purchased property, and after the title had been taken, the capital stock of the purchasing company was assigned by Willoughby to the Foggs and Gove, and was fully paid up.

In the transaction of 1909 the Commonwealth Company did not incur any indebtedness. The parties themselves recognized that this plant never became a part of the Commonwealth Company's property, for we find Willoughby himself long after, on August 7th, 1911, writing a letter to Horace Fogg where he says:

> "You must bear in mind this fact, and that is, if we merge the plants, as suggested in your letter, our interests must be protected by a guarantee of some kind."
>
> (Record, p. 83.)

And further on, on this phase of the case, this court says:

> "In that manner the Commonwealth Company acquired the purchased property, and we see no reason in law or in equity why its undertaking to pay for the same should not be enforced; to guarantee the payment of its own indebtedness was not to

> issue bonds or other obligations for the payment of money. * * * As a consideration for the guaranty there was not only an existing indebtedness, but there was a present moving consideration in the refunding of the indebtedness on more favorable terms, and the release of a burden that had been imposed upon the guarantor."

This statement assumes a condition clearly unsupported by any testimony. The Commonwealth Company had not prior to the execution of its guaranty in 1911, secured by its mortgage, undertaken to pay any part of the purchase price of plaintiff's plant. The obligation to pay this purchase price was expressed by a contract in writing to which the Commonwealth was not a party, so that as far as it was concerned at the time of the execution of the guaranty there was no "existing indebtedness" for the payment of which it was responsible. It having been stipulated by the parties that the capital stock of the five thousand dollar Tacoma company was paid in full, there could be no liability of any nature on the part of any stockholder of the Tacoma Company, whether the Commonwealth Company, or any one else, as Article XII, Section 4, of the Constitution of Washington provides:

> "Each stockholder in all incorporated companies * * * shall be liable for the debts of the corporation to the amount of his unpaid stock, and no more."

That a corporation is a distinct legal entity, as distinguished from its stockholders, and that a guaranty by the largest stockholder of a corporation of a debt of the corporation was the debt of another person under

the statute of frauds of the State of Washington, and must be evidenced by a writing to be binding, was decided and settled by the Supreme Court of the State of Washington in the case of *Goldie-Klenert Distributing Co. v. Bothwell,* 66 Wash. 267.

In the case of *Pittsburg & Buffalo Co. v. Duncan,* 232 Fed. 584, the Circuit Court of Appeals, Sixth Circuit, said:

> "The mere fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, so as to make a contract of one binding upon the other, where each corporation is separately organized under a distinct charter."

Even assuming, as this court does, that the existing indebtedness of the Tacoma Company was the indebtedness of the Commonwealth Company, and that as a consideration for the refunding of that indebtedness on more favorable terms it executed the undertaking secured by the mortgage on its plant involved in this action, the transaction would still be one clearly prohibited by this Section of the Constitution, as the renewal, or the extension of an indebtedness on more favorable terms is not "money or property received, or labor done," and an agreement made by a corporation to pay money, based on such a consideration, is in violation of the constitutional provision referred to, and cannot be enforced.

In *Nichols v. Waukesha Co.*, 195 Fed. 807, the Circuit Court of the Eighth Circuit said:

> "Existing debts are not money, and to say that they are property capable of estimation at its true money value does violence to the words used."

The decision of this court on this assumed state of facts is in direct conflict with its decisions in the case of *Farmers Loan & Trust Co. v. San Diego St. Ry. Co.*, 45 Fed. 528.

Chavelle v. Washington Trust Co., 226 Fed. 408.

And is in direct conflict with the decisions of the federal court of other circuits, notably,

Mudge v. Black, 224 Fed. 919;

In re Progressive Wall Paper Co., 229 Fed. 496, which presents almost a parallel situation.

Pacific Coast Pipe Co. v. Conrad, 237 Fed. 675;

Lyon v. Bleeg, 240 Fed. 407;

Kemmerer v. St. Louis Blast Furnace Co., 215 Fed. 65.

In view of the foregoing we respectfully submit a rehearing of this case should be granted.

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CHARLES T. PETERSON,
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Solicitors for Appellees and Petitioners.

(CERTIFICATE OF COUNSEL FOLLOWS.)

Certificate of Counsel.

I hereby certify that I am of counsel for appellees and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Charles O. Bates,

Of Counsel for Appellees and Petitioners.